U.S. Department of Labor

Office of Administrative Law Judges
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CASE NOS.: 2001-LHC-02033
2001-LHC-02034
2001-LHC-02035

OWCP NO.: 01-128185
01-128186
01-126858

In the Matter of

LEROY K. COUSENS, SR.
Claimant

v.

ELECTRIC BOAT CORPORATION
Self-Insured Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Scott N. Roberts, Esquire, Groton, Connecticut,
for the Claimant

Edward W. Murphy, Esquire (Morrison, Mahoney & Miller),
Boston, Massachusetts, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND SPECIAL FUND RELIEF

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Leroy K. Cousens, Sr. (the Claimant), a former shipyard worker, against the Electric Boat Corporation (the Employer) under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the matter was referred to the Office of Administrative Law Judges for a formal hearing which was conducted before me in New London, Connecticut on August 15, 2001. The hearing afforded all parties an opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The Director, OWCP did not appear, having advised by letter dated July 30, 2001 that it had received notice of the Employer's application for Special Fund Relief pursuant to 33 U.S.C. §908(f) and did not wish to participate in the hearing. ALJX 6.[1] The Claimant testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits CX 1-3 and Employer's Exhibits RX 1-13. TR 10-13. At the close of the hearing, the record was held open to afford the parties an opportunity to offer post-hearing deposition testimony, additional medical records and stipulations. TR 91-93. Within the time allowed, the following documents were submitted:

Attorney Murphy Letter of 9/6/01 re: stipulation on AWW	ALJX 7
Attorney Roberts Letter of 9/12/01	ALJX 8
Deposition of Kathleen M.R. Tolman taken 9/7/01	RX 14
Report from H. Jones, M.D. dated 9/27/01	RX 15
Deposition of Al Sabella taken 9/7/01	CX 4

No objection was raised to any of the post-hearing evidence, and these exhibits have all been admitted. Both parties waived submission of written closing argument, and the record is now closed.

After careful analysis of the evidence contained in the record I conclude that Claimant is entitled under the Act to an award of temporary total and permanent partial disability compensation with interest, medical care and attorney's fees. I further conclude that the Employer is entitled to Special Fund relief as well as a credit for past voluntary compensation payments. My findings of fact and conclusions of law are set forth below.

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[1] Documentary evidence will be referred to herein as "CX" for an exhibit offered by the Claimant, "RX" for an exhibit offered by the Employer, "JX" for a joint exhibit, and "ALJX" for the formal papers. References to the hearing transcript will be designated as "TR".

II. Stipulations and Issues Presented

The parties have offered the following stipulations:

(1) the Claimant sustained injuries to his right hand on July 14, 1987, to both hands on November 27, 1992 and to his right shoulder on December 22, 1992;

(2) the claims in this matter are for temporary total disability benefits from November 18, 1996 through January 3, 1997 and for permanent total or permanent partial disability benefits from January 4, 1997 to the present and continuing;

(3) the parties are subject to the Act;

(4) an employer-employee relationship existed at the time of the Claimant's injuries;

(5) the Claimant's injuries arose in the course and within the scope of his employment with the Employer;

(6) the Employer was timely notified of the various accidents and injuries;

(7) notice of controversion, Form LS-207, was timely filed;

(8) the date of the informal conference is May 19, 2001;

(9) disability resulted from the Claimant's injuries;

(10) medical benefits were paid in the amount of $6,485.64 for the Claimant's July 14, 1978 right hand injury and $15,448.32 for the Claimant's October 27, 1992 injury to both hands;

(11) the Claimant was paid 6 3/7 weeks of temporary total disability compensation from November 18, 1996 to January 1, 1997 in the total amount of $4,636.03, permanent partial disability compensation in the total amount of $38,710.80 on October 17, 1996 for an 11% loss of use of both hands, and permanent partial disability compensation in the total amount of $20,250.17 on August 19, 1996 for a 9% loss of use of the right arm;

(12) the disability arising from the Claimant's injuries is permanent;

(13) the date of maximum medical improvement is January 4, 1997;

(14) the Claimant retired in July 1994; and

(15) the appropriate average weekly wage is $1,223.60, and the Claimant's compensation rate is the maximum Federal rate of $721.14.

JX 1; ALJX 8; TR 8-10. The parties further stipulated that the unresolved issues are: (1) whether the Claimant is a voluntary or involuntary retiree; (2) the nature and extent of the Claimant's disability; and (3) the Employer's entitlement to Special Fund relief under section 8(f) of the Act. TR 10-11.

III. Summary of the Evidence

A. The Claimant's Testimony

Mr. Cousens testified that he was born on February 5, 1939 and was 62.5 years of age at the time of the hearing. He is married (Barbara) and has no dependent children. He graduated from the Warren, Maine High School. TR 24-25.

After graduating from high school, the Claimant left Maine and relocated to Connecticut where he went to work on July 7, 1958 with his brother-in-law at the Employer's shipyard in Groton. TR 25-26. He testified that he was hired to work as a chipper/tank tester/grinder and used pneumatic tools, which operated between 6,000 and 25,000 RPMs, to grind and shape steel. He did this work for 14.5 years until 1973 when he was made grinder supervisor. TR 26-27. His responsibilities as a supervisor included training and evaluating about 25 subordinate employees, but he testified that he continued to use tools constantly, averaging at least one hour of tool use per day. TR 27-28. In 1975, the Claimant was again promoted to general foreman which required him to oversee the work of foremen their employees. However, he stated that he still used tools constantly to teach employees and that he had worked full-time doing grinding work during strikes in 1975 and 1988 and during a six week detail to Scotland. TR 29-30.

In 1990, the Claimant was promoted to area manager which he described as similar to his general foreman job with additional responsibility for 500 to 600 employees, work agendas on six or seven submarines under construction and keeping upper management abreast of work progress. TR 30-31, 71-75. He testified that he still had to go aboard vessels daily, climbing steps and ladders into confined areas, to check on work progress. TR 32-38. He stated that as an area manager he was required to be on the job and to lead by example. TR 38-39.

Regarding his injuries while working at the Employer, the Claimant testified that he fell approximately 50 feet off of a submarine in 1967 and was taken by ambulance to the Lawrence and Memorial Hospital where he was diagnosed with a possible skull fracture and a fractured left wrist. Following this accident, he was out of work for three months. TR 76.

The Claimant testified that on July 14, 1987 he was walking in a "graving dock" where a submarine was being prepared to be moved when a rigger pulled on a line which caused him to fall about ten feet through a grate, landing on his right arm and hand. TR 39-40. He went to the

Employer's yard hospital which referred him to Dr. Krijger in Norwich, Connecticut. He stated that he saw Dr. Krijger four or five times for neck, back and shoulder pain. Dr. Krijger prescribed a cervical pillow and work restrictions, but he did not lose any time from work due to this injury. TR 41-44.

The Claimant testified that he could not identify any specific trauma which caused the November 11, 1992 injury to his hands. He stated that had mentioned his hand problems to a few of the nurses at the yard hospital who recommended that he seek treatment outside of the Employer. TR 44-45. In 1991 or 1992, he saw Dr. Cherniack at the Lawrence and Memorial Hospital's occupational health clinic for his hand problems as well difficulty walking, reduced neck mobility and no shoulder strength and grip strength which made climbing ladders at work difficult. TR 45-46, 48. He said that Dr. Cherniack referred him to Dr. Zeppieri who recommended surgery on both hands which he declined to avoid losing time from work. TR 47. Because of these increasing problems and his concern about missing time from work, he "pulled a few strings" and obtained a transfer in 1991 to the second shift where the work was less physically demanding, and he could schedule daytime medical appointments on his own time. TR 48-49. The Claimant further testified that he began to experience problems with his right shoulder in November 1992 and underwent a MRI in December 1992 which showed that he suffered from an impingement. TR 52. In addition, he began to experience increasing back pain running into his legs and said that a MRI showed two herniated lumbar discs and two bulging cervical discs. TR 50.

The Claimant stated that he was not able to leave the Employer before 1994 because an employee must be 55 years old and have at least 30 years service in order to retire. TR 53. He said that a new labor agreement which had a bearing on his retirement eligibility was ratified in July 1994 and that July 15, 1994 was the earliest he could retire. TR 53-54. He testified that he felt that he was "too beat up to continue" working, and he explained that he no longer could keep up with the physical pace of the work, so he began to skip on-site inspections of work which eventually caught up with him when he relied on "bogus" information provided by others. TR 54-55. Although his performance appraisals in the last few years continued to be favorable, he attributed the favorable ratings to "friendship" and said that he had slipped from being the top-rated area manager out of nineteen to fifth or sixth. TR 78. He stated that he spoke to Lee Vincent, a friend and retirement specialist in the Employer's human resources office, about a medical retirement, but Ms. Vincent recommended that a regular retirement would be better for him:

> And she's also a friend of mine. I've known her for a long time through work, and I was talking with her and I said, "Lee, you know, I'm getting ready to retire but I think I'm going about it the wrong [way]. I think I should be getting a medical retirement." I said, "I'm all messed up." And she said, "No, believe me, you don't want to do that." She said, "Stay with your retirement. Your retirement is better. You got a good retirement." And I said, "Well, that's not the way I should be going." But, I said, "Hey, I don't know." And I left.

TR 56-57. The Claimant stated that he would have continued working but for his medical condition, noting that he was at the peak of his earning capacity and had earned $60,025.00 by July 15, 1994. TR 59. Although he would liked to continue earning this income, he knew that a "golden handshake" was coming, so he accepted a "level income" pension which provides him a total of $2,087.00 per month in social security plus retirement benefits. TR 59, 61. He also stated that he retired due to the combination of his injuries rather than any one injury. TR 77. He testified that the Employer was undergoing "big time" downsizing at the time he retired, and he provided the following response to a question as to whether a fear of being laid off played a role in his decision to retire:

> No. I didn't – I would have probably welcomed being laid off but I didn't want to get fired. What happens, if I may, is that with the years of service I had, I didn't want to be demoted anymore and that meant less money that I would get. Then I wouldn't have been able to go. Then I don't know what would have happened. I had to maintain status quo. If I was going to leave, I had to leave. I had to make the decision and go.

TR 79. He acknowledged signing papers that his retirement was not medical, and he stated that he did not request any accommodation for his disability from the Employer. TR 80.

Since his retirement, the Claimant spends time between his summer home in Maine and a winter home in Florida. TR 69-70. He does not have any hobbies such as fishing or golf. TR 84-85. He said that he tried walking along a railroad line but stopped because of discomfort in his shoulders, back and neck. TR 59-60. He stated that he finds it difficult to get by on his retirement benefits but does not feel that he could perform any work with his level of pain. TR 61. He testified that he had met with an vocational expert retained by the employer but was unfamiliar with the front desk, fitness desk and gift shop clerk positions she had identified as potential employment opportunities. TR 64-65. He stated that the jobs identified at the Samoset Resort are about 11 miles from his home and that other jobs in Rockland, Rockport and Camden, Maine are within 14 or 15 miles of his home. TR 67-68. However, the Claimant testified that he did not believe that he could perform any of these jobs because he has difficulty sitting or standing for extended periods and sometimes has to lie down in a fetal position. TR 65-66.

The Claimant further testified that he had submitted five applications for jobs moving cars at large dealerships in Florida. He stated that the applications required him to list any physical limitations. He has not been hired or looked for any other work. TR 61-62, 82-84. He was questioned on cross-examination about his ability to do any work and responded that he could not work on a consistent basis. TR 86. He said that he could not do a job such as answering a telephone because his hands ache after holding a phone for five or six seconds. He has never tried using a telephone headset. TR 86-87. In addition to his various orthopedic problems, the Claimant testified that he had noticed that his breathing has become more difficult. He said that he is not sure whether this is due to age, but he admitted that he smoked cigarettes at a rate of 3/4 pack per day from the age of 26 to 1986 when he quit. He also stated that he had been concerned

about asbestosis when he went to the occupational health clinic for evaluation and said that a chest x-ray taken there showed bilateral pleural plaques. TR 46, 87-88.

B. Medical Evidence

Records from the Employer confirm that the Claimant fell off of a ladder at work on August 16, 1967 and sustained multiple injuries including a fractured left wrist and various contusions and abrasions. RX 11 at 1-4. He was initially out of work until December 1967 when his treating physician, A.R. van Dyk, M.D., certified that he could return. *Id*. at 11. However, the records show that the Claimant continued to experience left wrist pain and back pain which caused him to lose additional time in April and May 1968 after which he returned to work on light duty. *Id*. at 6-10.

The record also contains more recent reports from several physicians which were reviewed and summarized by Susan Vincent, RN, BSN in a June 11, 2001 progress report to the Employer. RX 1. Nurse Vincent's summary of the medical records is set forth below:

> Regarding Mr. Cousens initial injury claim #134845 of right middle finger strain/sprain, Mr. Cousens presented on 07/15/87 to Dr. Krijgar complaining of pain and tingling in the right hand following a fall on 07/14/87. X-rays ruled out any fractures and he was diagnosed with hyperextension sprain of the second, third, and fourth digits. Anti-inflammatories were prescribed. The claimant was given a splint and instructed in range of motion exercises. The claimant remained working at this time. The physician listed Mr. Cousens as partially disabled with no time loss involved. On 08/10/87 at his third follow-up appointment, Mr. Cousens admitted to having another problem related to the fall and complained of neck strain. His neck range of motion was slight decreased on examination. Mr. Cousens refused therapy and a "Treat Your Own Neck" book was issued. Regarding his hand, the physician believed he was improving. Mr. Cousens continued to work. Mr. Cousens continued to follow up with Dr. Krijgar and continued to complain of symptoms related to his cervical strain and hand strain. The last note available was dated 09/28/87 and the claimant was to follow up again in one month after x-rays were obtained. No further notes from Dr. Krijgar were available, so I could assume treatment ended at this time. There was no indication that MMI was met.
>
> Regarding claim #161693 for carpal tunnel/white finger vibrating injury, Dr. Zepperi [sic] saw Mr. Cousens on 11/09/92 for an initial assessment. He reported ongoing shoulder pain along with his hand symptoms of tingling and numbness. A thorough examination was performed. Nerve conduction studies were performed, showing mild bilateral carpal tunnel syndrome and mild right ulnar distal sensory neuropathy. The only indication of the claimant*s work status was noted in a 12/14/92 note stating he had been out of work since 11/30/92. There were no further references to return to work and, as previously stated, attempts were made

to clarify this with the attorney and physician. I would assume treatment was ongoing, but the next available note indicated a right carpal tunnel release was performed 10/24/94 and subsequently a left release was performed November 1994, according to the IME report. The claimant again followed up with Dr. Zepperi [sic] on 09/29/95 regarding noted continued dysesthesia in the right thumb and index finger. He was able to function with the hand quite well. Regarding his status at this time, Dr. Zepperi [sic] assigned him a Permanent Partial Impairment Rating of 11 percent of the dominant right upper extremity and right hand from the residual carpal tunnel symptoms. He also noted continued shoulder discomfort and limited range of motion. Based on this, he assigned him a nine-percent Permanent Partial Impairment Rating of the right upper extremity. He believed both of these were due to the work injury of 12/22/92, which overlaps with the carpal tunnel injury. Regarding the left hand, he would assign him an 11-percent Permanent Partial Impairment Rating of the non-dominant left wrist and hand. He did not place Mr. Cousens on any restrictions at this time. A Dr. Smigielski (Orthopedist) responded to a letter from a Bruce Bouley of Comprehensive Claims Review Associates on 02/28/96 regarding the claimant*s ratings. Due to the claimant*s residual symptoms of both hands, he assigned Mr. Cousens a ten-percent impairment of both extremities. He assigned him a three-percent impairment of the whole person related to the shoulder arthritis, for an overall impairment of 15 percent regarding the hand and right shoulder.

In July 1996, Mr. Cousens was seen by Dr. S. P. Browning and determined to have white finger vibrating disease and not carpal tunnel syndrome. He assigned him a ten-percent rating of the right hand and a 15 percent Permanent Partial Impairment Rating of the left hand. He recommended that he not use air tools or be exposed to temperatures below 50 degrees F. He also began to complain of diffuse back pain at this time, which Dr. Browning believed was a back sprain related to pulley cables.

During a recheck on 09/30/96 for white finger vibrating disease, Mr. Cousens again discussed his back pain complaints and Dr. Browning diagnosed a chronic back strain. X-rays were taken, which appeared normal. At this point discussion of the injury to his hands ends, as does his treatment with Dr. Browning. There is no indication that MMI was met.

Regarding the December 1992 right shoulder injury, claim #163984, Mr. Cousens had a MRI of the right shoulder done on December 1992, which showed a small partial tear due to impingement. There was no indication of a rotator cuff tear. Dr. Cherniack was seeing the claimant and in December 1993 referred the claimant to Dr. Marc Galloway. Dr. Galloway saw the claimant on 04/08/94. He reports the claimant related initially injuring his shoulder in a 1987 fall and that he did not bring up the issue of his shoulder pain until 1992 when being followed for his carpal tunnel complaints. He had received therapy for his shoulder from December

1992 to March 1993 without any relief. After examination, Dr. Galloway concluded that surgery might be necessary. He recommended a trial of steroid injection for relief and diagnostic purposes.

The next available report is an IME done in December 1995. At that time, Mr. Cousens continued to complain of ongoing shoulder pain and surgery had not occurred. The claimant had since retired from his job at Electric Boat. According to Mr. Roberts* letter, Mr. Cousens retired 07/14/94. The IME related that Mr. Cousens might be a surgical candidate to repair his right shoulder problem for an acromioplasty and possible rotator cuff repair.

Mr. Cousens began therapy for his shoulder from 08/29/96 to 10/14/96. Dr. Zepperi [sic] again followed him for treatment of his shoulder. He considered the claimant to be Temporarily, Totally disabled from 08/28/ to 10/10/96 and ordered a MRI of the cervical spine due to new complaints of back pain. The spine MRI showed a disc herniation at L4-5. The claimant was referred to Dr. Halperin for evaluation of back pain. He recommended a myelogram/CT scan if the symptoms in the neck are persistent. On 11/06/96, Dr. Zepperi[sic] determined surgery of the right shoulder to be necessary. He underwent an arthroscopic debridement of the glenoid labrum, distal clavicle resection, and acromioplasty on 11/18/96. Mr. Cousens saw Dr. Zepperi [sic] in follow up on 12/04/96. Dr. Zepperi [sic] determined the claimant to be Temporarily, Totally Disabled for two weeks. He was again seen on 12/05/96. The claimant persisted with full though painful range of motion of the shoulder. He was referred for therapy. He remained Temporarily, Totally disabled until his next follow-up.

Mr. Cousens was seen on 01/02/97 and released from care with no restrictions regarding his shoulder.

On 01/03/97, Dr. Zepperi [sic] was asked by Mr. Cousens to provide a rating for him for his injuries to his neck and low back he alleges were sustained in a 12/22/92 work-related accident. The adjuster*s notes indicate that the claimant pursued permanency for these injuries and based on claim # 163984, but these were denied as they were apparently not related body parts. Dr. Zepperi [sic] assigned him a five-percent total impairment of the cervical spondylosis. He assigned an 11-percent Permanent Partial Impairment of the whole person for the neck and low back injuries. Dr. Zepperi [sic] believed Mr. Cousens had reached Maximum Medical Improvement.

Id. at 2-4. After reviewing the medical records, Nurse Vincent commented that "Mr. Cousens' sporadic complaints and numerous treating physicians made it difficult to completely interpret the information available." *Id*. at 4. Undoubtedly, this is a fair statement given the Claimant's multiple complaints and diagnoses. Fortunately, the parties have simplified my task by stipulating that the Claimant sustained work-related injuries resulting in permanent disability. Since the sole

medical issue presented for adjudication concerns the extent of the Claimant's disability and whether he has any earning capacity, I have focused my review of the medical records on specific limitations identified by the physicians which might have a bearing, as discussed below, on the Claimant's ability to work and earn wages.

On July 11, 1994, four days before the Claimant retired, Dr. Zeppieri reported that he complained of pain and discomfort in the right arm and shoulder, difficulty opening jars, and numbness in the thumb, index and middle fingers which was aggravated by writing, holding a telephone and driving. Dr. Zeppieri's diagnosis was bilateral carpal tunnel syndrome and right rotator cuff impingement, and he scheduled the Claimant for carpal tunnel release surgery. RX 3 at 1. After the carpal tunnel surgery, Dr. Zeppieri reported in September and October 1995 that the Claimant still complained of dyesthesia in both hands, though less severe than before the surgery, and he stated on October 19, 1995 that he placed no restrictions on the Claimant's activities. *Id.* at 4. Five years later, the Claimant was examined on June 26, 2000 by S.P. Browning, III, M.D., an orthopedic and hand specialist, who reported that the Claimant had a fairly good outcome from the carpal tunnel surgery considering the fact that his diagnosis is hand-arm vibration syndrome and not simple carpal tunnel syndrome. He stated that it was his opinion that the Claimant did not require further surgery, and he recommended that the Claimant avoid exposing his hands to cold. RX 2 at 1.

In a report dated September 25, 1996, Dr. Zeppieri indicated that he was evaluating the Claimant for neck, shoulder and low back pain and considered him to be temporarily totally disabled from August 28 to November 10, 1996. RX 3 at 5. On October 16, 1996, Dr. Zeppieri reported that the Claimant continued to have low back pain with radiation down the back of his left leg and neck pain with numbness in the web space between the right thumb and index finger. He stated that the Claimant continued to be totally disabled from work. *Id.* at 6. One month after the Claimant underwent left shoulder surgery on November 18, 1996, Dr. Zeppieri reported that he was making progress in therapy and would remain temporarily totally disabled for another two weeks when it was estimated that he could return to work. *Id.* at 14. On January 2, 1997, Dr. Zeppieri stated that the Claimant had full range of motion and much less pain in his right shoulder. As of this date, he said that there were no restrictions on his activities as far as the shoulder is concerned. *Id.* at 15.

On January 3, 1997, Dr. Zeppieri wrote to the Employer's compensation department that the Claimant had asked him to provide a rating for injuries to his neck and low back sustained in a work injury on December 22, 1992 when he fell approximately ten feet from a platform in a dry dock.[2] He stated that the Claimant reported pain and stiffness in his neck as well as persistent low back pain with radiation to the left leg since the 1967 fall off of the submarine. RX 3 at 16. Dr. Zeppieri further stated that the Claimant had reached maximum medical improvement and should do work requiring him to bend frequently or lift objects from floor level, lift and twist

[2] I appears that Dr. Zeppieri was referring to the July 14, 1987 accident when the Claimant tripped and fell while walking in the graving dock.

simultaneously, work with his hands outstretched or extended overhead, or lift more than 25 pounds. *Id.* at 17.

The most recent medical evidence was provided by Howard J. Jones. M.D. who examined the Claimant on August 9, 2001 in Stockton Springs, Maine at the Employer's request. He also conducted an exhaustive review of the medical records. RX 12. After rendering several opinions concerning the diagnosis and causation of the Claimant's complaints, Dr. Jones concluded,

> It is my medical opinion that Mr. Cousens may resume activity [sic] which fall into the Sedentary/Medium Physical Demand category and which do not require repetitive and forceful work above shoulder height on the right. It is my medical opinion that no other contraindications exist to Mr. Cousens returning to work at this time, and generally none have existed as far as I am able to determine from the medical record throughout the majority of Mr. Cousens' later care in the early 1990s.

Id. at 13-14. Dr. Jones is board-certified in preventative and occupational medicine. *Id.*

C. Vocational Evidence

The Claimant offered an employability evaluation which was prepared on June 15, 2000 by Albert J. Sabella, M.S., a certified vocational rehabilitation counselor. CX 2. Mr. Sabella reviewed the Claimant's work history and the medical records. He also administered the Purdue Pegboard, a standardized test that measures finger dexterity and is used to select employees for industrial jobs such as assembly, packaging, and operation of certain machines or other manual jobs. Mr. Sabella reported that the Claimant scored at approximately the fifth percentile for all normative groups on this test, and he concluded that the Claimant would have difficulty meeting production expectations for assembly or packaging work that requires finger, manual, or bi-manual dexterity. *Id*. at 4. Mr. Sabella also concluded that the Claimant does not have the functional capabilities to occupationally meet the requirements for his past relevant work at the Employer because he would be unable to meet the lifting, standing, extended reaching, and other exertional requirements for his work as a grinder or as supervisor/foreman. *Id*.

Mr. Sabella noted that a percentage of the Claimant's supervisory duties at the Employer were sedentary in nature; however, it was his opinion that any skills the Claimant acquired in his past work, such as writing narrative reports and completing paperwork, are not presently transferable to other work as they are stale and particular to work at the Employer. Thus, he concluded that the Claimant is essentially an unskilled worker. *Id*. at 5. Mr. Sabella further stated in evaluating the Claimant's employability, he developed an occupational profile which included physical limitations involving his right dominant extremity that limit his ability to use it repetitively in a vocationally meaningful manner. In addition, he stated that took into consideration the Claimant's cervical, left hand and low back problems which limit his ability for lifting, standing, sitting, as well as sustained activity. He also stated that the factors of the Claimant's age, absence from the workforce for six years and lack of transferable skills compromise his ability to

successfully compete in the competitive open labor market. *Id*. Based on the Claimant's occupational profile, Mr. Sabella concluded,

> Given this profile, Mr. Cousens* access to the labor market has been severely eroded. In order to work substantially and competitively at any job, an employee must have consistent attendance (regular work hours), consistently attend to task (concentration), carry out job-duties in a timely manner (persistence of pace), maintain acceptable productivity and quality, and perform on a consistent weekly, monthly basis. Therefore, based on reasonable and practicable vocational circumstances in job requirements, and given the composite and compounded effect of the above outlined occupational profile, and for the reasons I have sited, my opinion is Mr. Cousens could not meet the physical and employment requirements of even sedentary work on a consistent, ongoing basis, and is unemployable.

Id. at 5-6. Mr. Sabella testified at a deposition on September 7, 2001. CX 4. Mr. Sabella testified that he has a masters degree in vocational rehabilitation and is certified as a rehabilitation counselor and disability management specialist. He has been involved in vocational rehabilitation since 1975 and with workers' compensation and long-term disability issues since 1984. He also is under contract with the Social Security Administration, Office of Hearings and Appeals to provide vocational testimony before administrative law judges in disability hearings. *Id*. at 3-5.

Mr. Sabella testified that in developing an occupational or employability profile for the Claimant, he considered transferability of skills, age, work background and functional capacities. *Id*. at 7. In this latter regard, he stated that he based the Claimant's physical limitations on the medical reports from Dr. Zeppieri and his interview with the Claimant who indicated that his lifting capacity was in the ten to fifteen pound range at maximum, that he is unable to do repetitive activities with his right upper extremity and that he is susceptible to become fatigued during the day with activity. *Id*. at 8-10, 19, 33-34.[3] Mr. Sabella explained that he deferred any educational or achievement testing because it was clear that the Claimant could read, write, understand and speak English and perform mathematical computations. *Id*. at 11-12. However, he reiterated his view that the Claimant does not possess any transferable skills and stated that the Claimant's absence from the workforce in recent years, coupled with his age, was a major negative factor in his employability. *Id*. at 15-16. He also reiterated his view that the combination of the Claimant's physical limitations, age, and lack of transferable skills and recent employment experience make him unemployable. *Id*. at 19, 28.

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[3] Counsel to the Employer objected to Mr. Sabella's testimony regarding the Claimant's employability to the extent that it is based on the Claimant's description of physical limitations which are not supported by the medical record. CX 4 at 18. The objection is overruled. However, the question of whether the Claimant's self-described limitations are supported by the medical evidence will be taken into consideration in determining the appropriate weight to be given to Mr. Sabella's opinions.

Mr. Sabella was questioned about Ms. Tolman's labor market survey. He stated that she had not developed any type of occupational profile and based her opinions solely on the fact that Dr. Zeppieri limited the Claimant's lifting to 25 pounds. *Id.* at 21. While he basically agreed with Ms. Tolman's identification of the skills the Claimant has acquired from his past employment, he maintained his opinion that the Claimant does not have any skills that would be transferable to sedentary positions. *Id.* at 21-22. Mr. Sabella was asked to comment on the jobs at the Samoset Resort which would seem to allow the Claimant to sit, stand and move about at will. He responded that labor market surveys are unreliable because "when you get information concerning a job, you only can get a positive response from a prospective employer." *Id.* at 22. He further explained that when an employer is contacted and asked whether they would consider an older worker or whether they would accommodate a workers' physical limitations, it is unlikely that the employer would give a negative response because of anti-discrimination laws. *Id.* at 23.[4]

On cross-examination, Mr. Sabella testified that he does not believe that the Claimant is medically capable of performing sedentary work. *Id.* at 29. In this regard, he explained,

> It goes back to what I was getting into as far *as* what I considered the basic tenants of employability. Certainly, I feel that Mr. Cousens has physical capabilities. He is certainly not physically incapacitated. He does go about and do daily activities. The problem is vocationally. There is a big difference between doing daily activities at a time and pace of your own choosing and then being able to do work activities. In order to work substantially and competitively at any type of job, an employee must have consistent attendance and maintain regular work hours. They have to attend to the work task and concentrate in what they are doing. They have to be able to maintain a persistence of pace and carry out whatever job duties they are doing in a timely manner, and they have to be able to maintain acceptable productivity and quality. And they have to perform on a consistent weekly and monthly basis. You can*t be going in late periods of time. You can*t be taking days off.

Id. at 30. Mr. Sabella's opinion that the Claimant could not competitively perform a sedentary job appears to have been based on the Claimant's own description of his limitations:

> Q. Okay. And he told you – so what did he tell you about looking, for his efforts of securing employment?
>
> A. As I recall, he told me that he just didn't feel that he could work on a consistent basis, that he would be unable to fill the requirements of

[4] The Employer's objection to this testimony as speculative is sustained. CX 4 at 23-24. Mr. Sabella stated that he has done labor market surveys, but his testimony is devoid of any foundation for his apparent belief that employers, either generally or in this particular case, provide false or unreliable information about the physical requirements of jobs.

> attendance and punctuality; and he has been a hard worker for all his life and if he can't work hard for another employer, he doesn't – he though it would be a futile effort.

Id. at 39.[5] Mr. Sabella testified that he had been successful in placing workers who are 62 years old in jobs, that it is generally true that employers are willing to hire retired workers, that it is not an extraordinary situation for an employee to be hired after being out of work for a period of time, and that employment with a single employer for 36 years would generally be considered a positive sign by a prospective employer. *Id.* at 36-37, 39. He further testified that the Claimant's background indicated that he had good people skills and was a good supervisor, but he repeated his opinion that the Claimant's supervisory skills would not be transferable because they are "stale" and because supervisory jobs today invariably require computer literacy and an ability to deal with a workforce that is younger and changed from what he dealt with at the Employer. *Id.* at 40-41. Mr. Sabella also agreed that the Claimant could use a telephone with the aid of a headset and that he could probably could be on the telephone for "an hour or so" if he could sit or stand at will. *Id.* at 43. However, he said that he did not think that the Claimant could work on the telephone for eight hours based on the Claimant's statements regarding his daily activities and need to take rests periodically during the day as he becomes fatigued, particularly after using his hands and right upper extremity. *Id.* at 43-45.

The Employer introduced a labor market survey which was prepared on August 14, 2001 by Kathleen R. Tolman, CDMS, CCM, a disability management specialist. RX 13. Ms. Tolman reviewed the Claimant's work history and medical records, and she identified potential employment opportunities:

> (1) Clerk II for the State of Maine at $8.61 to $11.12 per hour with jobs located throughout the State of Maine; employees may sit as needed and work within a 20 pound lifting restriction;
>
> (2) Customer Activation Specialist at MBNA in Camden, Maine at $11.54 per hour plus bonuses and a 10% differential for evening shifts;
>
> (3) Customer Retention Specialist at MBNA in Rockland, Maine with the same pay and hours as the Customer Activation Specialist position;
>
> (4) - (7) Reservation Specialist, Front Desk Clerk, Fitness Desk Clerk and Part-time Gift Shop Clerk at the Samoset Resort in Rockport, Maine at $8.00 per hour ($7.00 per hour for the Gift Shop Clerk); none of the positions require lifting 25 pounds.

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[5] The deposition transcript actually reads "feudal effort" which, the Court assumes, represents a transcription error rather than a malaprop on the part of the witness.

Id. at 8-10. Based on her survey, Ms. Tolman concluded that the Claimant has a wage-earning capacity of $320.00 to $522.40 per week, excluding bonus income, and she stated that she expected that the Claimant would earn wages at the higher end of this range given his years of successful experience in supervisory positions. *Id.* at 10.

Ms. Tolman's testimony was taken by post-hearing deposition on September 7, 2001. RX 14. She testified that she is certified as a disability management specialist and case manager in Rhode Island and as a vocational rehabilitation provider in New Hampshire. She has 12 years experience in vocational rehabilitation. *Id.* at 4. Ms. Tolman stated that she had reviewed the medical reports from Drs. Zeppieri and Jones in determining the Claimant's physical limitations; specifically, no frequent bending, lifting objects from the floor, lifting and twisting simultaneously, no working with arms outstretched or overhead and no lifting more than 25 pounds per Dr. Zeppieri, and medium to sedentary work that would not require repetitive or forceful activities above shoulder level on the right per Dr. Jones. *Id.* at 9. In addition, she testified that the Claimant advised her that he has a lung condition and avoids fumes, smoke, odors, perfume, hair spray and potpourri. *Id.* at 10-11. She stated that it was her impression that the Claimant is a very likeable gentleman who would make a favorable impression on a prospective employer. *Id.* at 10. Ms. Tolman stated that she does about nine to twelve labor market surveys within the State of Maine each year and that it was her conclusion that the Claimant is employable. *Id.* at 11. She did not believe that the Claimant's age (62) or the fact that he has not worked since 1994 are barriers to his ability to re-enter the workforce. *Id.* at 18-19.

Ms. Tolman testified that in looking for suitable employment opportunities for the Claimant, she concluded that he had acquired transferable skills from his past employment which she considered in addition to his physical limitations. The skills that she considered transferable are an ability to follow instructions carefully and understand technology involved in the work he directed, experience in training and communicating with people and working with a variety of people and in a variety of situations, an ability to make decisions involving a great deal of money and safety of workers, an ability to learn procedures and techniques, and an ability to use math. *Id.* at 12-13. She stated that she focused on finding jobs where the Claimant would utilize his cognitive skills and which would involve communicating with people. *Id.* at 13. Although she determined that the Claimant had also acquired certain physical skills, she did not consider these skills in her labor market survey as they were inconsistent with the Claimant's physical limitations. *Id.* at 22-23. She stated that she identified the seven positions in her labor market survey through the internet and newspaper advertisements. She then contacted the prospective employers directly. *Id.* at 13-14.

Ms. Tolman was questioned about the seven positions listed in her labor market survey. She stated that the pay rates cited in the survey were reflective of the current labor market and that the jobs would have paid less in 1994. *Id.* at 20-21. She stated that the Clerk II position is located throughout the State of Maine and pays between $8.61 and $11.12 per hour, 40 hours per week. *Id.* at 14-15. She expected that the Claimant would earn at the higher end of this scale based on his prior supervisory experience. *Id.* at 28. She said that most of the jobs are located in Augusta, a 53 minute commute from the Claimant's home in Warren, but there is also a state

office in Rockland, closer to the Claimant's home. *Id.* at 23-24, 28. She stated the job requires clerical work, filing and running occasional errands which can be performed within a 20 pound lifting restriction. She added that the job involves sitting, walking and standing but she did not have specifics information on how much walking is involved. She also acknowledged that there may be some bending required to perform filing functions *Id.* at 25.

She testified that the two jobs at MBNA in Camden and Rockland involve no lifting and are considered sedentary, but the employees may also stand at their desks. She stated that both jobs involve dealing with customers on the telephone, and the employees wear telephone headsets. *Id.* at 16-17. The MBNA jobs are about 15 minutes from the Claimant's home and paid $24,000 per year, or $11.53 per hour, plus a bonuses of 10% for evening hours. *Id.* at 29. Ms. Tolman stated that the customer activation specialist job has been available since at least 1993. *Id.* at 29-30. With regard to the four jobs at the Samoset resort, Ms. Tolman stated that none of the positions require any lifting in excess of 25 pounds. She was not aware of the specific requirements for sitting or standing. *Id.* at 17-18.

IV. Findings of Fact and Conclusions of Law

A. The Nature of the Claimant's Retirement – Voluntary or Involuntary

The fundamental purpose of [the Act] is to compensate employees . . . for wage-earning capacity lost because of injury." *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 298 (1995). Since the Claimant was not totally disabled *prior* to retiring, he must as a threshold matter show that his retirement was not voluntary in order to establish that any post-retirement loss of income is due to his injuries. *Compare Hoffman v. Newport News Shipbuilding and Dry Dock Co.*, 35 BRBS 148, 149 n.2 (2001) (affirming ALJ's finding of voluntary retirement and denial of post-retirement compensation for wage loss where the claimant suffered a traumatic knee injury, returned to work on light duty and then accepted an early retirement package negotiated by the employer and union) *with Harmon v Sea-Land Service, Inc.*, 31 BRBS 45, 48 (where a claimant is totally disabled and subsequently accepts retirement, the nature of the retirement is irrelevant and the "sole relevant inquiry with respect to claimant's burden of proof is whether claimant's work injury precludes his return to his usual work.")

The Claimant testified that were it not for his medical problems, he would have continued working at the Employer as he was earning nearly $10,000 per month which is well in excess of the $2,087 he currently receives in combined monthly benefits from Social Security and his pension. He also admitted that he had signed papers indicating that his retirement was "voluntary" and that he was concerned at the time of his retirement that he might be demoted to another position as the Employer was undergoing downsizing. Based on my observations of his demeanor, and noting the absence of any inconsistencies or contradictions, I find the Claimant's account of his reasons for leaving the Employer in July 1994 to be entirely credible. The Board has upheld a finding of involuntary retirement based on a claimant's credible testimony that he would not have retired but for medically documented problems. *See MacDonald v. Bethlehem*

Steel Corp., 18 BRBS 181, 193 (1986). Since the credible evidence establishes that the Claimant's decision to leave his lucrative position as area manager was at least in part due to his medical condition, I find that he must be considered as an involuntary employee under the Act. *See Hansen v. Container Stevedoring Co.*, 31 BRBS 155, 157 (1997) ("Where, however, a claimant's retirement is due, at least in part, to his occupational disease, claimant is not a voluntary retiree and . . . is entitled to an award based on his loss of wage-earning capacity and may therefore be entitled to permanent total disability compensation pursuant to Section 8(a) of the Act."); *Pryor v. James McHugh Const. Co.*, 18 BRBS 273, 279 (1986) (reversing ALJ finding of voluntary retirement where the Claimant testified that he retired in part due to breathing problems).

B. Nature and Extent of the Claimant's Disability

The Claimant seeks temporary total disability benefits from November 18, 1996 through January 3, 1997 and permanent total or permanent partial disability benefits from January 4, 1997 to the present and continuing. JX 1. "Disability" is an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. §902(10). Thus, the concept of disability under the Act is economic as well as medical. *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). "The degree of disability in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, and the availability of that type of work which he can do." *American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970).

1. The Claimant's Ability to Return to His Usual Employment

In a claim for disability compensation that is not based on the schedule of losses in section 8(c) of the Act, a claimant has the initial burden of establishing that he can not return to his usual employment. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). A claimant's usual employment is defined as the regular duties the claimant was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc*., 14 BRBS 689, 693 (1982). To determine whether a claimant has carried his or her *prima facie* burden of establishing an inability to return to usual employment, the administrative law judge must compare the medical opinions regarding the claimant's physical limitations with the requirements of the claimant's usual work at the time of the injury. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988).

The Claimant testified that in addition to significant office responsibilities, his job as an area manager required him to board vessels daily, climb steps and ladders and enter confined areas to check on work progress. Dr. Zeppieri has restricted the Claimant from frequent bending, lifting objects from floor level, lifting and twisting simultaneously, working with his hands outstretched or extended overhead, or lifting more than 25 pounds. Dr. Jones concluded that the Claimant could perform "sedentary/medium" demand work which does not require repetitive and forceful work above shoulder height on the right. These restrictions are consistent with the Claimant's testimony that he had difficulty using his hands overhead to climb ladders. In addition,

the Claimant credibly testified that he retired in July 1994 because he was no longer physically able to keep up with the physical demands of his job, and the Board has held that a claimant's credible complaints of pain alone may be enough to meet his burden of establishing that he can not return to his usual employment. *Anderson v. Todd Shipyards Corp*., 22 BRBS 20, 21 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855, 857 (1982); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981); *Golden v. Eller & Co.*, 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). Therefore, I conclude that the Claimant has met his burden of establishing that he would be unable to perform his usual work as an area manager.

2. Suitable Alternative Employment

Since the Claimant has established that he is unable to return to his former employment because of a work-related injury, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment; that is, realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991) (*Palombo*); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981) (*Gulfwide Stevedores*); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989). If the Employer does not carry this burden, the Claimant is entitled to a finding of total disability. *American Stevedores v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976); *Rogers Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986). To satisfy its evidentiary burden, "the employer does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo*, at 74, citing *Gulfwide Stevedores* at 1042-43. Once an employer satisfies its burden, a claimant may rebut the showing of suitable alternative employment by establishing "that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo*, at 74, quoting *Gulfwide Stevedores* at 1043.

The Employer's vocational evidence establishes that jobs have been available since 1993 within 15 miles of the Claimant's post-retirement residence in Maine as a customer representative for MBNA. These positions require no lifting and allow the employee to alternate between sitting and standing in the work area. In addition, Ms. Tolman testified that the employees wear a telephone headset which eliminates any requirement for repetitive use of the hands that might violate the Claimant's restrictions. Though the Claimant has testified that he does not believe that he has the stamina to perform any job on a consistent, sustained basis, I find his non-specific description of limitations unpersuasive, especially in the absence of any medical opinion in the record that he is restricted in terms of his ability to sit, stand or walk. Similarly, I give little credence to Mr. Sabella's opinion that the Claimant could not perform these jobs for an eight hour shift since he is not a physician and did not identify any objective medical evidence he relied upon to arrive at this view. I also recognize that Mr. Sabella has suggested that there are adverse vocational factors such as age, prolonged absence from the workforce and stale skills which would hamper the Claimant in securing competitive employment. However, it is the Claimant's burden, once the Employer establishes the existence of suitable jobs, to show that he has exercised reasonable diligence in attempting to secure employment, but was unsuccessful. Here, the

Claimant testified that, aside from applying for jobs at car dealerships in Florida for which he was not physically qualified, he has made no effort to look for work since July 1994, and he has not applied for any of the jobs identified by the Employer's vocational expert. Accordingly, I find that the Employer has established that suitable alternative employment has been existence since the Claimant left the Employer in July 1994, and the Claimant has not succesfully rebutted the Employer's showing. *C.f. Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986) (claimant may prevail if he demonstrates he diligently tried and was unable to obtain a job), *cert. denied*, 479 U.S. 826 (1986). Although the finding that the MBNA jobs constitute suitable alternative employment opportunities makes it unnecessary to consider whether the additional jobs at the State of Maine and the Samoset Resort are also suitable, it is noted that there is no evidence that any of these jobs have physical requirements that are incompatible with the Claimant's medical restrictions.

Based on my finding that the Employer has established that suitable alternative employment is and has been available, I conclude that the Claimant is not entitled to a finding of total disability with the exception of the temporary period between August 28, 1996 and January 3, 1997 when Dr. Zeppieri reported that the Claimant was temporarily totally disabled until recovery from left shoulder surgery. In the absence of any contradictory medical evidence, I find that the Claimant was under a temporary total disability during this period; otherwise, the extent of his disability has been partial. As for the nature of his disability, I adopt, as fully supported by the medical evidence, the parties' stipulation that the Claimant reached maximum medical improvement on January 4, 1997, and I consequently conclude that he has been under a permanent partial disability since that date. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989).

B. Amount of Compensation Due and Employer Credits

Pursuant to section 8 of the Act, the amount of the Claimant's disability compensation is calculated from his average weekly wage. 33 U.S.C. §908. In cases involving a traumatic injury, the average weekly wage is calculated as of the time of injury for which compensation is claimed. 33 U.S.C. §910; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 149 (1991); *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 104 (1991); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196, 200 (1989); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 193 (1984); *Hasting v. Earth-Satellite Corp.*, 8 BRBS 519, 524 (1978), *aff'd in pertinent part*, 628 F.2d 85 (D.C. Cir.1980), *cert*. *denied*, 449 U.S. 905 (1980). The parties have stipulated that the appropriate average weekly wage is $1,223.60 and that the applicable compensation rate is the 1994 Federal maximum of $721.14.

I have concluded that the Claimant was under a temporary total disability from August 28, 1996 through January 3, 1997. Based on the parties' stipulation, I find that the Claimant is entitled pursuant to section 8(b) of the Act to compensation for the claimed period of temporary total disability, November 18, 1996 to January 3, 1997, at the stipulated compensation rate of $721.14.

The Claimant's entitlement to compensation commencing January 4, 1997, is controlled by section 8(c)(21) of the Act which provides that in cases of permanent partial disability not covered by the schedule of losses "compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability." 33 U.S.C. §908(c)(21). Calculating the amount of compensation under section 8(c)(21) therefore requires a comparison of the Claimant's pre-injury average weekly wage ($601.00) with his post-injury wage-earning capacity. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 60 (2nd Cir. 1989) (*LaFaille*). "Wage-earning capacity" refers to an injured employee's "ability to command regular income as the result of his personal labor." *Seidel v. General Dynamics Corp.*, 22 BRBS, 403, 405 (1989), quoting 2 Larson, *The Law of Workmen's Compensation* §57.51 at 10-164.64 (1987). With regard to determinations of wage-earning capacity, section 8(h) of the Act provides,

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h). Since the Claimant has not secured alternate employment or been offered any post-injury work by the Employer, it is appropriate to use the earnings established for the suitable alternative employment on the open market to fix his wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 42-44 (1996). Ms. Tolman testified that the MBNA customer representative jobs presently pay $11.53 per hour, but she did not know what these positions paid in 1994.[6] To ensure that the Claimant's wage-earning capacity is not distorted by inflationary factors, the wages shown to be presently available from suitable alternative employment must be converted to their equivalent at the time of injury. *LaFaille*, 884 F.2d at 61; *Kleiner v. Todd Shipyards Corp*., 16 BRBS 297, 298 (1984). Absent evidence of the wages that MBNA actually paid in 1994, I will use the annual percentage increases made to the National Average Weekly Wage to adjust the current $11.53 wage downward. *Quan v. Marine Power & Equipment Company*, 30 BRBS 124, 127-28 (1996); *Richardson v. General Dynamics Corp*., 23 BRBS 327, 330-31 (1990). The $11.53 hourly rate produces a present average weekly wage of $461.20 for the MBNA jobs. The National Average Weekly Wage has increased 23.58% between July 1994 and the last annual increase on October 1, 2001.[7] Therefore, the present average weekly wage of $461.20 is adjusted downward by a factor of 76.42% to arrive at a July 1994 equivalent average weekly wage of $352.45 for the MBNA jobs. I find that this fairly and reasonably represents the Claimant's post-injury wage-earning capacity. Based on this calculation, I find that the Claimant has suffered a loss of wage-earning capacity in the amount of $871.15 per week (the difference between his average weekly wage and his wage-earning capacity) and, pursuant to section 8(c)(21), he is entitled to permanent partial disability compensation at the rate of 66 2/3% of that difference, or $580.77 per week from January 4, 1997 to the present and continuing.

Since the parties have also stipulated that the Employer has previously paid periods of temporary total and permanent partial disability compensation, I find that the Employer is entitled to a credit in the amount of its prior compensation payments pursuant to section 14(j) of the Act. *Balzer v. General Dynamics Corp*., 22 BRBS 447, 451 (1989), *aff'd on reconsideration*, 23 BRBS 241 (1990); *Scott v. Transworld Airlines*, 5 BRBS 141, 145 (1976).

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[6] In determining the Claimant's post-injury wage-earning capacity, I have not considered bonuses or night differential premiums because there has been no showing on this record that the Claimant would be entitled to any bonus or that he would be offered a shift for which a premium rate is paid.

[7] Employment Standards Administration, Office of Workers' Compensation Programs Division of Longshore and Harbor Workers' Compensation, Chart of National Average Weekly Wages (NAWW), available at www.dol.gov/dol/esa/public/regs/compliance/owcp/NAWWinfo.htm.

D. Entitlement to Special Fund Relief

Section 8(f) of the Act limits an employer's liability for permanent partial, permanent total disability and death benefits to a period of 104 weeks, after which compensation liability is assumed by a Special Fund established pursuant to 33 U.S.C. §944, when the disability or death is not due solely to the injury which is the subject of the claim. 33 U.S.C. §908(f); *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail itself of relief under this provision, an employer or insurance carrier must file an application with the District Director (formerly the Deputy Commissioner) of the Department of Labor's Office of Worker's Compensation Programs (OWCP) pursuant to section 8(f)(3) which, as amended, provides:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3). The record shows that the Employer submitted its application for Special Fund relief while the claim was pending before the District Director who was unable to make a determination. ALJX 2. Thus, the OWCP has not raised the section 8(f)(3) absolute defense. *Cf. Tennant v. General Dynamics Corp.*, 26 BRBS 103, 107 (1992) (where the absolute defense is asserted, the administrative law judge can not consider the merits of the employer's section 8(f) application before initially considering whether the request submitted to the district director was sufficiently documented as required by 20 C.F.R. §702.321).

Turning to the merits, an employer must meet three requirements to avail itself of section 8(f) relief. The first two requirements are: (1) the employee must have had a pre-existing permanent partial disability; and (2) the pre-existing disability must have been manifest to the Employer. *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 793 (2nd Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305 (2nd Cir. 1992) (*Luccitelli*). In cases involving a permanent partial disability, the third requirement that an employer must meet is a showing that the Claimant's disability is "materially and substantially" greater than would have resulted from the subsequent injury alone. 33 U.S.C. §908(f)(1). The "subsequent" injuries in the case for section 8(f) purposes are the July 14, 1987 injury to the right hand, the November 27, 1992 injuries to both hands and the December 22, 1992 injury to the right shoulder. The Employer contends that the Claimant's prior injury in August 1967 combined with the subsequent injuries in 1987 and 1992 to make his current disability materially and substantially greater than would have resulted from the subsequent injuries alone.

As discussed above, the record shows that the Claimant suffered a serious traumatic injury in August 1967 when he fell off of a submarine. In his evaluation, Dr. Jones stated that it was his medical opinion that the Claimant's "low back pain, left lower extremity symptoms and L4-5 disc herniation most likely are causally related to his occupational accident of 1967" and that "a permanent impairment of 5% to the Whole Person would be appropriate to describe Mr. Cousens' L4-5 disc herniation, treated conservatively with no evidence of radiculopathy." RX 12 at 12-13. Based on this uncontradicted medical evidence, I find that the Employer satisfies the first requirement that the Claimant have a pre-existing permanent partial disability.

Regarding the second requirement, the Benefits Review Board has held that, "[i]t is well established that a pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." *Esposito v. Bay Container Repair Co.*, 30 BRBS 67, 68 (1996). The Claimant's August 1967 injury occurred at work and was contemporaneously documented in the Employer's medical and personnel records. RX11 at 1-13. Clearly, the Employer had actual knowledge of the Claimant's pre-existing condition prior to his subsequent injuries in 1987 and 1992. Therefore, I find that the Claimant's pre-existing permanent partial disability was manifest to the Employer.

Regarding the third requirement, Dr. Jones responded in a letter dated September 27, 2001 to the question of "whether his previous conditions having dates of onset in 1967, have combined with the injuries of 1987 and 1992 to materially worsen Mr. Cousens' disability." RX 15. On this question, he stated,

> By reference to my previous report of 8/9/2001, I would acknowledge a certain degree of uncertainty on my part exists concerning the dates of injury and specific injuries reported by Mr. Cousens. Following my logic expressed in my report, Mr. Cousens 1967 injury did most likely contribute significantly to Mr. Cousens* self reports of activity limitation throughout his subsequent employment, which, by and large, form the basis of Mr. Cousens* reported disability. In my medical opinion, the cervical condition and the effects of the 1967 injury appear to continue to represent components of Mr. Cousens* ongoing complaints to some degree, although the causal association of his carpal tunnel syndrom to his work activities or injuries remains unclear and much of his disability and specific cause and effect relationships to particular dates of injury remain unclear from the medical record. Finally, it should be noted that Mr. Cousens did continue to remain employed through the early 1990*s, obviously many years after his 1967 injury had occurred. Thus his work-limiting injuries would presumably either have occurred more proximate to 1990, or would have included pre-1980*s pathology which had progressed over time.

Id. Standing alone, this opinion is somewhat equivocal. However, when read in conjunction with Dr. Jones' earlier opinion that the Claimant's L4-5 disc herniation and left leg symptoms are

causally related to the 1967 injury and produced a permanent partial disability, I find that it reasonable to interpret Dr. Jones' response as reflecting his opinion that the permanent partial disability resulting from the August 1967 injury makes the Claimant's current disability materially and substantially greater than would be the case with the subsequent injuries alone. Dr. Jones' opinion is supported by the objective medical evidence, and there is no contrary medical evidence. Accordingly, I find that the Employer satisfies the third and final requirement for Special Fund relief.

In view of my finding that the Employer has satisfied the requirements for Special Fund relief under section 8(f) of the Act, its liability for the Claimant's permanent partial disability benefits is limited to the maximum period of 104 weeks commencing on January 4, 1997 when the Claimant's partial disability reached maximum medical improvement and became permanent. 33 U.S.C. §908(f)(1).

E. Medical Care

An Employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). An award of Special Fund relief under section 8(f) does not relieve an employer of its liability for a claimant's medical benefits pursuant to section 7(a). *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418, 421 (1983), *rev'd on other grounds sub nom Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295 (4th Cir. 1984); *Scott v. Rowe Mach. Works*, 9 BRBS 198, 200-01 (1978); *Spencer v. Bethlehem Steel Corp.*, 7 BRBS 675, 677 (1978); *Duty v. Jet America, Inc*., 4 BRBS 523, 531 (1976). The parties have stipulated that the Employer has voluntarily paid for the Claimant's medical care in the past, and the Employer has not disputed its liability for continuing medical care. Accordingly, I will order that the Employer pay for any future medical treatment which may be reasonable and necessary for the Claimant's work-related injuries.

F. Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp*., 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should

be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney's Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976); *Ingalls Shipbuilding v Director, OWCP*, 920 F.2d 163, 166 (5th Cir. 1993). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer and Carrier will be granted 15 days from the filing of the fee petition to file any objection.

H. Conclusion

In sum, I have concluded that the Claimant is entitled to an award, to be paid by the Employer, of temporary total disability compensation from November 18, 1996 through January 3, 1997. I have further concluded that the Claimant is entitled to an award of permanent partial disability compensation to be paid by the Employer for a period of 104 weeks, commencing January 4, 1997, and by the Special Fund pursuant to section 8(f) of the Act after expiration of the Employer's 104 week liability. Since the Employer has previously paid temporary total and permanent partial disability compensation to the Claimant, I conclude that it is entitled to a credit in the amount of these past payments pursuant to section 14(j) of the Act. Finally, I have determined that the Employer is liable for reasonable medical care necessitated by the Claimant's work-related injuries, attorney's fees and interest on unpaid compensation.

V. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Electric Boat Corporation, shall pay to the Claimant, Leroy K. Cousens, Sr., temporary total disability compensation pursuant to 33 U.S.C. §908(b) commencing November 18, 1996 and continuing through January 3, 1997 at the rate of $721.14 per week;

2. The Employer shall pay the Claimant permanent partial disability compensation benefits pursuant to 33 U.S.C. §908(c)(21) at the weekly compensation rate of $580.77 commencing January 4, 1997 and continuing thereafter for 104 weeks;

3. The Employer shall be allowed a credit pursuant to 33 U.S.C. §914(j) for prior payments of temporary total and permanent partial disability compensation;

4. After the cessation of payments by the Electric Boat Corporation, continuing permanent partial disability compensation benefits shall be paid, pursuant to 33 U.S.C. §908(f), from the Special Fund established at 33 U.S.C. §944 until further order;

5. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries may require pursuant to 33 U.S.C. §907;

6. The Employer shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

7. The Claimant's attorney shall file, within thirty (30) days of the filing of this Decision and Order in the office of the District Director, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to file any objection; and

8. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A
DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd